No. 20068

In the

United States Court of Appeals

For the Ninth Circuit

JIM GARVISON, G. E. CHINN, W. DON CAWOOD, CECIL SEAVEY, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS PENSION TRUST FUND; E. W. SHIELDS, FRED PETERSON, EARL DILTS, JACK ROPER, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS MEDICAL-HOSPITALIZATION TRUST FUND; PORTLAND AREA PAINTERS AND DECORATORS JOINT COMMITTEE, INC., a non-profit Oregon corporation; and LOCAL NO. 10 OF THE BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA, *Appellants,*

vs.

NORMAN A. JENSEN, *Appellee.*

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, *Judge*

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REPLY TO APPELLEE'S "FACTUAL BACKGROUND AND DISCUSSION OF PERTINENT DOCUMENTS"

As stated on page 4 of our opening brief, this case presents two primary questions for determination by the court:

(a) Whether it is permissible, under the provisions of Section 302 of the Labor Management

Relations Act of 1947, 29 USCA §186, for a labor union to provide coverage for its employees, including its officers, by making payments to a jointly administered medical trust and to a pension trust.

(b) Whether it is permissible, under the provisions of Section 302 of the Labor Management Relations Act of 1947, 29 USCA § 186, for a jointly administered medical trust to provide, through insurance, medical and hospital benefits for retired employees who were beneficiaries of the Plan prior to their retirement and upon whose work employer parties to the collective bargaining agreement had made payments to the trust.

It appears that, since the Court of Appeals for the Eighth Circuit has answered both of these questions in the affirmative in *Blassie v. Kroger Co.*, 345 F2d 58 (1965) and in *Local No. 688, International Bro. of Teamsters v. Townsend*, 345 F2d 77 (1965), the appellee in this case now seeks to cloud the real issues with irrelevant matter in his extended "factual background" material. We submit that this material is all irrelevant to the real issues involved and, consequently, we will limit our discussion of this portion of appellee's brief to a few matters wherein we feel that otherwise an erroneous impression might be created.

Appellee has placed some emphasis upon the point that he was not a member of any chapter of the employer organization when he first became bound by Plaintiff's Exhibit 1, the contract which requires that payments be made to the two trusts (Appellee's Brief

p. 3). While this obviously makes no difference insofar as the legal questions involved are concerned, it should be noted that the plaintiff testified that he did thereafter and on January 1, 1963, join the Mt. Hood Chapter of the Painting and Decorating Contractors of America (Tr. p. 125-126). This was subsequent to the adoption of both trust agreements. The two trust agreements (Plaintiff's Ex. 2 and 4) were executed by Mr. A. E. Boone, who was the president of the Mt. Hood Chapter in 1962 (Tr. 118).

Appellee states that the "local joint committee" was the vehicle designated for enforcing the contract, including the pension and medical trusts (Appellee's Brief p. 5). Whether this is accurate or not is completely immaterial, because the respective trustees each have the authority and the duty to take any action necessary to enforce payment of the contributions due from employers (Plaintiff's Ex. 2 p. 11, Plaintiff's Ex. 4 p. 10). Thus the medical trust and the pension trust clearly operate independently from the "joint committee" and must proceed with whatever legal action might be necessary to collect contributions.

Appellee's discussion in his brief on pages 7 and 8 of what the witness Brown contended preceding the adoption of the pension trust agreement (Plaintiff's Ex. 4) is likewise irrelevant. Since the real question is simp-

ly whether it is permissible under section 302 of the Labor Management Relations Act for union employees to participate in such a trust, it matters not how the fund agreement was arrived at nor who may have insisted that the trust agreement provide for such participation. Moreover, the witness Murphy, president of the Oregon Council of Painting and Decorating Contractors of America, at the time the contract and trust agreement were negotiated testified that Brown had no authority to negotiate on either the contract or the trusts (Tr 158-159).

Appellee on page 13 of his brief seeks to create an erroneous impression in comparing the amounts paid to the medical trust by employers on an hourly basis and by some employers for their non-bargaining unit employees and by some of the unions for their employees on a monthly basis. He points out that at one time the "flat fee" was $13.50 and makes a comparison between a monthly payment based upon 180 hours at 12c an hour, or $21.60, with the $13.50 figure. Appellee overlooks several important considerations in making this comparison. First, there is no evidence that the average painter works 180 hours each month and, second, it is well known that particularly in this industry employment is not regular. Employees working at this trade simply do not average nearly "180 hours per man

per month." Under the plan an employee must have 100 hours to his credit to be covered, and for each month of coverage 100 hours is deducted from his reserve (Tr. 105-106). Appellee's statements might suggest that, in effect, employers were paying $21.60 per month for coverage for all employees in the bargaining unit, as against the "flat fee" of $13.50. This, of course, is not true. The employers simply paid 12c per hour for each hour worked, until the rate was increased to 15c per hour in 1964. Whether a given employee is covered or not depends upon whether he has a sufficient reserve of hours to provide him with coverage. When the "flat fee" method is used, the amount necessary to cover the premium is paid and the employee concerned is covered for the month involved, whether he be a union employee or one of the employer's employees not within the bargaining unit.

Appellee has placed some emphasis upon the continuance of coverage by Local 10 of Roy Hill after he left his office in Local 10 (Appellee's Brief pp. 13, 25). Of course, the evidence established that during this period Mr. Hill had no claims; in other words, that no medical or hospital benefits were paid to him (Tr. 146). Consequently, the trust could not possibly have been adversely affected in any way by the fact that the union mistakenly continued to make the flat fee payments on Mr. Hill.

REPLY TO APPELLEE'S ARGUMENT CONCERNING RETIRED EMPLOYEE COVERAGE

Appellee claims that the trustees did not have authority to adopt the coverage for retired employees under the trust agreement. This same question was raised in *Blassie v. Kroger Co.*, 345 F2d 58, 70. In the *Blassie* case the trust agreement had contained an initial reference to retired persons and this reference was deleted by a subsequent amendment in 1958. The Court of Appeals for the Eighth Circuit, nevertheless, ruled that the extension of coverage to retirees was not prohibited by the trust agreement, reasoning that the term "employees" relates to the time of contributions rather than to the time of possible enjoyment of benefits (345 F2d at 71). We submit that the question of the meaning of the term "employee" is the same under section 302 of the statute as under the trust agreement. In other words, if it is proper for benefits to be extended to persons who were covered by the plan prior to their retirement under the statute because they are "employees" within its meaning, they are also "employees" under the trust agreement.

The retiree coverage was provided in 1958 under the terms of the trust document then in existence (defendants' Ex. 8). In that trust agreement the term "employees" was defined as follows:

"EMPLOYEES shall mean any Painter, Decorator, or Paperhanger and any other Employee covered by the existing Labor Agreement represented by the Unions, who is employed by any signatory Employer, *or any other employee or employees agreed upon by a majority vote of the Trustees.*" (Emphasis added)

There was absolutely no evidence to indicate that nyone who participated in the preparation or adoption f the 1962 amended trust agreement (Plaintiff's Ex. 4) or the medical trust intended to eliminate the coverage or retired employees which had been in effect since 958. This coverage had been in effect during the imediately preceding contract between the employers nd the union (Defendants' Ex. 3) and for part of the ontract which preceded defendants' Exhibit 3 (Defendnts' Ex. 4), and there is nothing to indicate that there as any intent on the part of any of the parties negotiatg the contract (Plaintiff's Ex. 1) to eliminate this overage. This part of the plan was placed into effect y the board of trustees composed of both employer epresentatives and employee representatives and two ollective bargaining agreements were negotiated thereafter with the plan and the coverage remaining in effect hroughout this period of time. Certainly, under these rcumstances, no further formal ratification by either de need be expected or required.

As appellee has pointed out on page 30 of his brief, the cost of the retiree benefits is nominal ($1.517 per month) when compared to the cost of benefits for active employees ($13.883 per month). Regardless of this fact, our position is that the extension of coverage to retirees here was lawful for the same reasons stated by the Court of Appeals in *Blassie v. Kroger Co.*, supra. Here the plan for retirees more than satisfies the requirements set by the court in the *Blassie* case. Not only must the retirees have been covered under the plan prior to retirement but five other pertinent requirements must be met for a retiree to receive benefits (see Appellants' Opening Brief, pp. 18-19).

With respect to the court's finding that retiree benefits are paid for from "extra assessments," this is incorrect because the employers simply pay to the medical trust the fixed hourly amounts established in the contract. Also, at the time of trial, it was established that there was a surplus in this trust in excess of $200,000.00 (Tr. 96-97).

It should be kept in mind that the medical trust has existed since 1953 (Tr. 76) and has been continued because successive collective bargaining agreements have provided for payments to this trust. The appellee points out that in the *Blassie* case the retiree coverage was extended in 1957, although the original trust was created

n 1953 (Appellee's Brief p. 31). In the present case the nedical trust also began in 1953, and retiree coverage vas commenced in 1958 (Tr. 98-99). The similarity)etween the cases in this respect is obvious. We submit hat the reasoning of the court in *Blassie v. Kroger Co.*, upra, is sound and directly applicable to the instant ase.

REPLY TO APPELLEE'S ARGUMENT CONCERNING UNION EMPLOYEE COVERAGE

In discussing this matter, appellee infers that some ind of discrimination or favoritism for union officers nder the two trusts has been established. Appellee oints to the coverage of union business representatives s though there is something unusual or evil about this, nd apparently infers that someone else ought to be overed. The point, of course, is that the business repre-ntatives and, in the case of Local 10, the financial ecretary are men who would be working at the trade nd thereby enjoying coverage under both trusts, if they ere not holding union offices. This is the reason for ie language contained in section 1 of Article I of the ension trust agreement (Plaintiff's Ex. 2) limiting un-)n employee coverage to those who occupy positions ther than clerical or stenographic. This is also the eason why the medical trust permits payments by the nion on an hourly basis on non-clerical employees

(Plaintiff's Ex. 2, pp. 6-7). Under the medical trust, the union, like the painting contractors, can contribute on stenographic help. The fact that stenographic employees are not subject to coverage under the pension trust nor paid on on an hourly basis to the medical trust certainly does not make either trust "grossly discriminatory" (Appellee's Brief p. 26). It must be noted that both trusts have been approved by the Internal Revenue Service (Tr. 132, Defendants' Ex. 5; Tr. 99-100, Defendants' Ex. 6).

We submit that appellee's claim of discrimination is an afterthought, made now because of the decisions of the Court of Appeals in the *Blassie* and *Townsend* cases. The pretrial order (R. 60-74) does not include any contention by appellee that either trust was "discriminatory." In the District Court the issue was confined to whether union employee coverage was permissible under section 302. In any event, neither the provisions of the trust agreement nor the practices are discriminatory — the unions are permitted to provide coverage by paying for it, and the union employees receive the same benefits as other employees. There is no evil here which Congress sought to prohibit by enacting section 302.

Appellee has pointed out that the employee trustees are also covered beneficiaries under each trust. Again there is nothing unusual or wrong about this. Under

each trust agreement the employee trustees are appointed by the local unions (Plaintiff's Ex. 2, p. 9; Plaintiff's Ex. 4, p. 8). Should the union select four trustees who are employed by painting contractors, the situation would be the same as that which appellee criticizes, in that these persons would be both trustees and beneficiaries. Nothing in section 302 disqualifies an employee-beneficiary from serving as a trustee.

APPELLANTS' COUNTER CLAIMS

As shown in our opening brief (Appellants' Brief p. 25), the amounts due from the plaintiffs to the respective trusts are stipulated. It seems perfectly clear that if the appellee's contentions with respect to the legality of participation by union employees and of coverage of retired employees are incorrect, then the trustees of the respective trusts are entitled to recover the contributions due from the plaintiff.

As the appellee has recognized (Appellee's Brief, p. 5), the District Court found that the provisions of the contract relating to local joint committees were separable from the remainder of the contract, including the provisions for employer payments to the pension trust and the medical trust (R. 77-78). The savings and separability clause in the present contract (Plaintiff's Ex. , p. 35) reads as follows:

> "If any provision of this Agreement is declared invalid, or applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this Agreement and/or applicability to any person, circumstance or thing, shall not be affected thereby."

We believe that the District Court's finding in this respect is sound. This result is supported by the decisions of the United States Supreme Court in *NLRB v. Rockaway News Supply Co.*, 345 US 71, 97 L ed 832, *Ebinger Baking Co. v. Bakery & Pastry Drivers & Helpers*, 194 F Supp 617, and *Eldridge et al v. Johnston*, 195 Or 379, 245 P2d 239.

In the *Rockaway News* case, the United States Supreme Court stated, at 97 L ed 838, as follows:

> "The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on — labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can be here."

Just as in the *Rockaway News* case, supra, decided by the Supreme Court, it is important here that the terms of the contract governing painters' wage rates, medical benefits, pension benefits and other conditions of employment be maintained as bargained for by the parties.

LIQUIDATED DAMAGES

Appellee contends that appellants cannot recover liquidated damages as outlined in the trust agreement, in addition to the principal amount of contributions due, upon the grounds that liquidated damages are only allowed when the actual damages are uncertain or difficult to ascertain, and never as a penalty in addition to the actual damages sustained.

In this connection, the pension trust agreement (Plaintiff's Ex. 2, at page 11) provides as follows:

> "Section 3. Liquidated Damages. The parties recognize and acknowledge that the regular and prompt filing of employer reports and the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Pension Plan, and that it would be extremely difficult, if not impracticable, to fix the actual expense and damage to the Fund and to the Pension Plan which would result from the failure of an individual employer to make such reports and to pay such monthly contributions in full within the time provided above. Therefore, the amount of damage to the Fund and Pension Plan resulting from failure to make reports or pay contributions within the time

specified shall be presumed to be the sum of $10.00 or 10% of the amount of the contribution or contributions due, whichever is greater, for each delinquent report or contribution. These amounts shall become due and payable to the Fund as liquidated damages and not as a penalty, upon the day immediately following the date on which the report or the contribution or contributions become delinquent. In addition, if any delinquent payment remains unpaid for a period of six months, the Trustees may then assess, as additional liquidated damages 6% of the total amount then delinquent. However, the Trustees in their discretion for good cause (and the Trustees shall have the sole right to determine what shall constitute good cause) shall have the right and power to waive all or any part of any sums to the Fund as liquidated damages."

The medical trust agreement (Plaintiff's Ex. 4, at p. 10) contains a similar provision. The question for the court to determine is simply whether the amounts sought by the defendant trustees in addition to the monthly amounts which the plaintiff has failed to pay constitute "liquidated damages" or are in fact "penalties."

Here the parties in each trust agreement have recognized that the trusts will sustain damages, the amount of which would be very difficult to ascertain if employers failed to file the proper reports and make the proper payments. Obviously the parties were simply recognizing the existence of actual facts. It is clear that each

trust would be required to investigate and take appropriate action when employer reports and payments are not made, and the exact cost of this extraordinary effort, which would have to be performed cannot be specifically determined. These are the reasons for the adoption of the liquidated damages provision in each trust agreement.

Moreover, it is manifest that trusts of this nature cannot function without prompt payments of the required contributions, and it is obvious that the failure of employers to promptly pay the required contributions would seriously impair the functioning of the trusts. It is well settled that in the determination of this problem the court should consider all of the circumstances which surround the parties, together with the ease or difficulty of measuring the breach in damages. A comparison of the size of the stipulated sum, not only with the value of the subject matter of the contract but also with the problem of the probable consequences of the breach as they appeared when the contract was executed, should be considered. See *Secord v. Portland Shopping News et al*, 126 Or 218, 224, 269 P 228.

The *Secord* case further indicates that "Where the damages are uncertain and speculative, the presumption ordinarily is that the parties have taken that into consideration in making the contract, and have agreed upon

a definite sum to be paid in case of a breach, in order to put the question beyond dispute and controversy and to avoid the difficulty of proving actual damages." Certainly the sums fixed as liquidated damages are most modest, in consideration of the probable consequences of a breach by one or more employers and the application of the rules outlined in the *Secord* case clearly indicates that such sums were agreed upon as liquidated damages and do not in fact impose a penalty.

APPELLEE'S REQUEST FOR ATTORENYS' FEES

Counsel has suggested that, should the court uphold the judgment below, either wholly or in part, the appellant trustees should be required to pay an attorneys' fee for appellee. This case was commenced and tried as an adversary proceeding. Appellee has cited no statutory or other authority to support his suggestion. In the absence of a contractual obligation, attorneys' fees may not be awarded unless a statute provides for them. See *Cereghino et al v. State Highway Comm.*, 230 Or 439, 451, 370 P2d 694.

CONCLUSION

In conclusion, the appellants respectfully submit that the judgment of the District Court should be reversed and the cause remanded with directions to enter judgment in favor of the appellant trustees on their counter claims.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellants